No. 3752

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

OZMO OIL REFINING COMPANY (a corporation), and PETROLEUM PRODUCTS COMPANY (a corporation),

Plaintiffs in Error,

vs.

COTTON & COMPANY, Incorporated,

Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

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BRIEF FOR PLAINTIFFS IN ERROR.

This is an action by Messrs. Cotton & Company of Buffalo, New York, against the Ozmo Oil Refining Company and the Petroleum Products Company of California for damages for breach of a contract to sell 700 tons of white semi-refined wax, known as Match Wax. The Ozmo Company was to commence delivery of the wax in November, 1918, shipping 50 tons per month to and including December, 1919. The price of the wax was to be 9¼c per pound, f.o.b. San Francisco. No wax was ever delivered.

The market price of the wax from November, 1918, to and including December, 1919, ranged from 9¢ to 6¢ per pound. (Transcript, page 113.) Under these facts, Messrs. Cotton & Company could not resort to the ordinary rule of damages, that is to say, the difference between the contract price and the market price of the wax. Instead, they sought as damages the difference between the contract price and the prices at which they had contracted to resell this wax to the Standard Oil Company and Messrs. Mitsui & Co.

The essential facts of the transaction are, as follows: In the latter part of August, 1918, the Ozmo Company got Messrs. Rutger, Bleecker & Company, brokers, to offer the wax to the trade. The brokers offered the wax to Messrs. Cotton & Company, who verbally accepted the proposition. The brokers then wrote to Messrs. Cotton & Company, as follows (Transcript, page 42):

"Letter-head
RUTGER, BLEECKER & Co.,
New York.
August 29, 1918.

The Cotton Co.,
37 Liberty St.,
New York City.

Gentlemen:

Attention of Mr. Leon.

We hereby confirm having sold to you for account of sellers on the Pacific Coast, who we believe are the Osmo Oil Refining Co., San Francisco, but subject to correction if any, 50 tons of Paraffine Wax monthly from November, 1918, to December, 1919, inclusive, in all 700

tons, quality—White Semi Refined, 105 to 108 degrees melting point not over 3% oil and moisture, packed in tight barrels, at 9¼c per lb. f.o.b. San Francisco, terms net cash, sight draft with bills of lading attached Pacific coast weights.

Official contract is being forwarded by our San Francisco office and in the meantime as confirmation we would suggest that you sign duplicate letter attached herewith.

Yours very truly,
Rutger, Bleecker & Co.
Per B. Rader."

In reply to that letter Messrs. Cotton & Company wrote Rutger, Bleecker & Co. the following letter (Transcript, page 43):

"August 31, 1912.

Rutger, Bleecker & Co.,
No. 87 Wall St.,
New York City.
Attention Mr. Rader.

Gentlemen:

We have your favor of the 29th inst., and confirm having purchased, through you, from the Ozmo Oil Refining Co. of San Francisco, seven hundred tons of Paraffine Wax, white semi-refined, 105/8° M. P., containing not over 30% oil and moisture, packed in double head barrels, for shipment fifty tons monthly, from November, 1918, to December, 1919, inclusive, at 9¼c per lb. f.o.b. San Francisco.

Terms net cash, sight draft attached bills of lading; Pacific Coast, gross weights less actual tares, as per licensed weighmaster's returns.

We are returning signed copy of your confirmation, as per your request, and await contracts, in order that we may send confirming purchase order.

Trusting that we shall be able to put through some more business together, before long, we are

Yours very truly,

Cotton & Company, Inc.

Sales Manager."

APL.BS.

Up to this time Cotton & Company had not given any notice to Rutger-Bleecker & Co. of any contracts of resale.

On September 30th Cotton & Company entered into an agreement with the Standard Oil Company to sell them 600 tons of the wax. (Transcript, page 29.) On October 1st Cotton & Company entered into a contract with Messrs. Mitsui & Co. to sell them 100 tons of the wax.

In the meantime, the "official contract", referred to in the letter of Messrs. Rutger, Bleecker & Co. of August 29th, was forwarded from San Francisco for signature. There was some correspondence between the parties in regard to the question of establishing a letter of credit and the form of the official contract was finally modified and executed by both parties on October 14, 1918.

From the time of the exchange of letters between Cotton & Company and Messrs. Rutger, Bleecker & Co., up to October 14, 1918, the only evidence of any notice of resale is, as follows: Mr. Leon, sales manager for Cotton & Company, testified that after the transaction with Messrs. Rutger, Bleecker & Co. he told their Mr. Rader that Cotton & Company had resold the wax. (Transcript, pages

58, 60, 64 and 65.) At page 64 on redirect examination, he said:

> "I notified Rutger, Bleecker & Co. within a few days that I had made a resale to the Standard Oil Company and Mitsui & Co.—within a very short time. That does not help me to refresh my memory as to how soon after the original offer and bid I notified Rutger, Bleecker & Co. that I had resold it, except that I know it was within a few days after the contract was closed. By this I mean after the offer had been made and accepted by Rutger, Bleecker & Co., and we had made a counter-bid which they accepted—but this was before any written contract was made."

On September 30th Cotton & Company wired the Ozmo Oil Refining Company and said, amongst other things:

"This material sold responsible buyers." (Transcript, page 49.)

On October 3rd Cotton & Company wrote the Ozmo Oil Company, amongst other things, as follows:

"The material has all been resold to responsible houses." (Transcript, pages 71, 72.)

This letter was received by the Ozmo Company on October 14th. (Transcript, page 110.) On October 8th Messrs. Cotton & Company wrote to the Ozmo Company stating that they had resold 600 tons of the wax to the Standard Oil Company and 100 tons to Mitsui & Co. (Transcript, page 73.) This letter was received by the Ozmo Company on October 14th. (Transcript, page 110.)

Messrs. Cotton & Company did not make any purchase of wax in the market so as to be in a position to fill their contracts with the Standard Oil Company and Mitsui & Co. (Transcript, page 40.)

Under these facts three questions are involved:

First: Did Cotton & Company's letter of August 31, 1918, answering the letter of Messrs. Rutger, Bleecker & Co. of August 29th and confirming the purchase of the wax, constitute an acceptance of the offer and make a binding contract? If it did make a binding contract, then the decision in this case is wrong and ought to be reversed for the reason that when that binding contract was made there is no pretense that the Ozmo Company or Messrs. Rutger, Bleecker & Co., their agents, had any notice whatever of a resale by Messrs. Cotton & Company.

Second: Assuming that the two letters referred to did not make a binding contract and that there was no binding contract until October 14, 1918—the date of the execution of the so-called "official contract"—was the notice of resale given to the Ozmo Company sufficient to charge them with special damages—that is to say, the difference between the contract price and the resale price?

Third: With the market price of the wax less than the contract price, ought not Messrs. Cotton & Company to have gone into the open market and purchased 600 tons to fill the Standard Oil contract and 100 tons to fill the Mitsui & Co.?

Specification of Errors Relied On.

1. The Court erred in finding that the contract between the parties was made on October 14, 1918 (Transcript, page 124) instead of finding that the contract was made on August 31, 1918. (Transcript, page 43.)

2. The Court erred in finding that before the execution of a binding contract between the parties, the Ozmo Company knew that Cotton & Company were about to purchase the wax for resale, and that they had actually resold the same. (Transcript, page 128.)

3. The Court erred in finding that Messrs. Cotton & Company had been damaged in the sum of thirteen thousand dollars with interest from May 31, 1919. (Transcript, page 129.)

4. The Court erred in making its conclusion of law that Messrs. Cotton & Company were entitled to judgment against the Ozmo Oil Company in the sum of thirteen thousand dollars, with interest from May 31, 1919, and costs.

Argument.

POINT I. THE OZMO COMPANY'S AGENT'S OFFER OF AUGUST 29, 1918, AND ITS ACCEPTANCE BY COTTON & COMPANY IN THEIR LETTER OF AUGUST 31, 1918, CONSTITUTED A COMPLETE AND BINDING CONTRACT. THE FACT THAT A FURTHER WRITTEN CONTRACT WAS CONTEMPLATED IS IMMATERIAL.

The letter of Messrs. Rutger, Bleecker & Co. of August 29th and the reply of Cotton & Company

dated August 31st set forth every necessary part of a complete contract for the sale and purchase of 700 tons of paraffine wax. The subject matter was accurately described. It was to be white, semi-refined wax, 105-8° melting point, not over 3% oil and moisture. The packing was described, the price was set forth, the terms were directed in detail, and the time and place of delivery clearly indicated. A reading of these two letters will convince the Court that the minds of the parties met on all the essential terms of the contract. No further formal writing was needed for its full expression. It was a common and usual contract for the sale of an ordinary article of commerce. Why, then, did the brokers and Messrs. Cotton & Company refer to a contract which was to be drawn up? It is a matter of common knowledge that transactions such as these are financed by banks and that for the purpose of making the necessary arrangements the banks must have some evidence of what the parties have agreed upon. That was the purpose of the so-called "official contract", and it was the only purpose. We ask the Court to note particularly that the signing of this "official contract" was not expressly made a condition precedent to the parties being bound.

There are numerous cases in which similar contracts have been construed by the Courts. In *United States v. P. J. Carlin Construction Company,* 224 Federal, 859, a construction company submitted a bid on certain government work, which was accepted. A formal contract was contemplated and was drawn

up by the government and sent to the construction company, which refused to sign. The Court said, at page 862:

> "(1) When parties enter into a mere verbal agreement, with the understanding that it shall be finally reduced to writing as the evidence of the terms of the contract, it may be that nothing is binding upon either party until the writing is executed. But where the parties reach an agreement through correspondence, intending that the agreement shall be subsequently expressed formally in a single paper or document, which, when signed, should be the evidence of what had been agreed upon, the obligatory character of the agreement cannot ordinarily be defeated by the failure of either party to sign the formal contract. If the court can see from the writings or correspondence that the minds of the parties have met, that a proposal has been submitted by one party which has been accepted by the other, and that the terms of the contract have been in all respects definitely agreed upon, one of the parties cannot evade or escape from his obligation by refusing to sign the formal contract, which the parties understood was subsequently to be drawn and executed. As said by the New York Court of Appeals in Sanders v. Pottlitzer Bros. Fruit Co., 144 N. Y. 209, 214, 39 N. E. 75, 76, 29 L. R. A. 431, 43 Am. St. Rep. 757 (1894):
>
> > 'Any other rule would always permit a party who has entered into a contract like this through letters and telegraphic messages to violate it whenever the understanding was that it should be reduced to another written form, by simply suggesting other and additional terms and conditions. If this were the rule, the contract would never be completed in cases where by changes in the market or other events occurring subsequent to the writ-

> ten negotiations it became the interest of either party to adopt that course in order to escape or evade obligations incurred in the ordinary course of commercial business.'
>
> And in Thomas v. Derring, 1 Keen, 729 (1837), Lord Langdale, Master of the Rolls, stated the rule as follows:
>
> 'I have no hesitation in saying that, by the offer made and accepted as it appears to have been in this correspondence, a binding contract was completed between these parties. It is true that mention is made in the letters of an intended formal contract, to be afterwards drawn up; but there are many cases in which correspondence, referring to the future execution of a more formal agreement, has been held to constitute in itself a valid contract, and I think that the correspondence is equivalent to a contract in the present case.' ''

In

> *New York etc. Co. v. Meyersdale Coal Co.,* 217 Federal, 747,

the New York Company quoted coal for delivery up to April 1, 1913, at $1.00 a ton, f.o.b. cars at mine, to be shipped at the rate of from 2,000 to 2,500 tons per month. The Coal Company answered, accepting the bid, and also said,

> "We will, in the course of a few days, make up the form of contract covering this purchase and send it to you, and in the meantime this letter will be sufficient authority for you to go ahead with shipments."

The contract referred to was never signed. The Court said, at page 750:

> "As we read the letters, they show a complete meeting of minds upon all terms of the

contract, and we regard the signing of the suggested form merely as a desirable convenience, and not as a condition precedent. The plaintiff's letter of August 16th, with the inclosed writing, stated definitely the terms on which the plaintiff was willing to make the contract, and to these terms the defendant agreed on August 19th, making the single exception that the time for initial delivery should be changed. This was a counter proposition; but it dealt with one term only, and when the plaintiff agreed to the change the contract was complete, and nothing more was needed to bind both parties. We do not find in the letters the intention of either party not to be bound until a formal writing had been signed, and in this respect the case differs essentially from several decisions that have been cited.

Further discussion seems to be needless. No term was left unsettled; everything had been agreed upon, either expressly or by plain implication or reference; and we see no sufficient ground for supposing that the execution of a formal writing was made a condition precedent to the taking effect of the contract. Many authorities on this subject will be found in 9 Cyc. 288, note 99, in 7 A. & E. Ency. 140, notes 1 and 2, and in 29 L. R. A. 431, note to Sanders v. Pottlitzer, etc., Co.

The judgment is reversed, and a new venire is awarded."

In

Whitted v. Fairfield Cotton Mills, 210 Federal, 725,

there was a sale of machinery evidenced by a certain memorandum, with the understanding that a formal contract was to be drawn and signed later. The Court held that it was error not to submit to the jury

the memorandum and correspondence, together with other evidence bearing on the question as to whether a valid contract was entered into between the parties when the memorandum was signed.

In

Wehner v. Bauer, 160 Federal, 240,

an agreement was made between the parties, certain in its terms, with the understanding that it should be thereafter reduced to writing. The learned judge who tried the instant case said, at page 243:

> "The rule, I think, is correctly stated in 7 Am. & Eng. Ency. of Law (2d Ed.) 140, where it is said:
>
> 'Many cases occur where parties negotiating a contract contemplate that a formal agreement shall be drawn up and signed. The question arises, does such a contemporaneous understanding or agreement make the validity of the contract depend upon its being actually reduced to writing and signed? The rule may be stated in these words. Where the parties make the reduction of the agreement to writing, and its signature by them a condition precedent to its completion, it will not be a contract until that is done, and this is true although all the terms of the contract have been agreed upon. But where the parcontract, the mere reference to a future contract in writing will not negative the existence of a present contract.'
>
> ties have assented to all the terms of the
>
> The evidence, to my mind, brings the contract in suit clearly within the rule stated in the last paragraph of the quotation just made. The record discloses nothing from which it can be said that the carrying out of the contract was

in the mind of either party thereto to be made to depend upon its being reduced to writing."

In

McConnell v. Harrell and Nicholson Company,
149 Northwestern, 1042 (1914 Michigan),

the Harrell Company wrote the following letter to McConnell:

"Mr. E. J. McConnell,
Waterford, Mich.

Dear Sir: After going over the situation carefully, we have decided to handle ice provided it will not cost us to exceed 90c per ton 2,000 f.o.b. cars Waterford, and will be willing to enter into a contract to take a minimum of 2,000 tons with privilege of 5,000 tons. You will readily understand that being a brand-new proposition with us it is difficult to estimate probable tonnage; however, you will put yourself in position to furnish us up to the maximum, and it won't take long after the ice season begins for us to determine our approximate requirements, thus giving you time enough to take on additional business required to get rid of the harvest. Our desire will be to hook up with you for our supply from year to year and be assured we will get our requirements without seeking new sources of supply. We have, we might say, made a success in our present time with strong competition and without any iceman within two miles of us we fail to see why we should not find an outlet for a goodly tonnage of ice each season and a steady business the year round. We shall expend $600 to try it out next year and will add as it grows.

Awaiting your acceptance and wishes as to further arrangements, we are,

Yours truly,
Harrell & Hoffman Co.,
O. Harrell, Prest. Mr."

To this letter the plaintiff replied, accepting the offer. The Harrell Company insisted that the letters were simply negotiations preliminary to a contract. The Court said, at page 1043:

> "(1) Whether these letters constitute a completed contract, or whether they were but steps in negotiations leading up to one, is a question of the intention of the parties. Gates v. Nelles, 62 Mich. 444, 29 N. W. 73; Wardell v. Williams, 62, Mich. 50, 28 N. W. 796, 4 Am. St. Rep. 814; Central Bitulithic Paving Co. v. Highland Park, 164 Mich. 223, 129 N. W. 46, Ann. Cas. 1912B, 719. In Congdon v. Darcy, 46 Vt. 478, which considers a like question, the following suggestions are made as an aid in determining the intention of the parties in such cases:
>
> > 'In determining which view is entertained in any particular case, several circumstances may be helpful, as: Whether the contract is of that class which are usually found to be in writing; whether it is of such nature as to need a formal writing for its full expression; whether it has few or many details; whether the amount involved is large or small; whether it is a common or unusual contract; whether the negotiations themselves indicate that a written draft is contemplated as a final conclusion of the negotiations. If a written draft is proposed, suggested, or referred to during the negotiations, it is some evidence that the parties intended to be the final closing of the contract.'
>
> (2) In order to be enforceable, this contract, under our statute, would have to be in writing. It was in writing. It had few details. The amount involved was not what would be regarded in the commercial world as a large amount. The contract would be considered an ordinary one. There is nothing in the contract

> which indicates that a written draft should be made before it became binding; in fact, the reverse of that is inferable from plaintiff's statement in his letter of acceptance, wherein he stated that he will proceed at once to purchase his lumber and erect his icehouse. True, he suggests that the contract be put in writing. This makes against the plaintiff's contention; but even this suggestion may be construed merely as a desire to have the terms of the contract put into more formal shape. Mississippi, etc., Steamship Co. v. Swift, 86 Me. 248, 29 Atl. 1063, 41 Am. St. Rep. 545."

In

Sanders v. Pottlitzer Bros. Fruit Company,
39 Northwestern, 75,

the Fruit Company, by letter, offered Sanders certain apples, specifying the quality, price, dates of shipment and terms. Sanders wanted some modification, and finally sent the following wire:

> "Letter received. Will accept conditions if satisfactory answer and will forward contract."

The Fruit Company wired its reply, as follows:

> "All right. Send contract as stated in our message."

Sanders prepared the contract and sent it to the Fruit Company, who returned it with certain modifications. This resulted in a refusal to sign the formal contract. The Court said, at page 76:

> "The writings and telegrams that passed between the parties contain all the elements of a complete contract. Nothing was wanting in the plaintiff's original proposition but the defendant's assent to it, in order to constitute a con-

tract binding upon both parties according to its terms. This assent was given upon condition that a certain specified modification was accepted. The plaintiffs finally assented to the modification, and called upon the defendant to signify its assent again to the whole arrangement as thus modified, and it replied that it was "all right," which must be taken as conclusive evidence that the minds of the parties had met and agreed upon certain specified and distinct obligations which were to be observed by both. It is true, as found by the learned referee, that the parties intended that the agreement should be formally expressed in a single paper, which, when signed, should be the evidence of what had already been agreed upon. But neither party was entitled to insert in the paper any material condition not referred to in the correspondence, and if it was inserted without the consent of the other party it was unauthorized. Hence the defendant, by insisting upon further material conditions, not expressed or implied in the correspondence, defeated the intention to reduce the agreement to the form of a single paper signed by both parties. The plaintiffs then had the right to fall back upon their written proposition, as originally made, and the subsequent letters and telegrams; and, if they constituted a contract of themselves, the absence of the formal agreement contemplated was not, under the circumstances, material. When the parties intend that a mere verbal agreement shall be finally reduced to writing, as the evidence of the terms of the contract, it may be true that nothing is binding upon either party until the writing is executed. But here the contract was already in writing, and it was none the less obligatory upon both parties because they intended that it should be put into another form, especially when their intention is made impossible by the act of one or the other of the par-

ties, by insisting upon the insertion of conditions and provisions not contemplated or embraced in the correspondence."

And again at page 77:

"The principle, therefore, which is involved in the case, is this: Can parties who have exchanged letters and telegrams with a view to an agreement, and have arrived at a point where a clear and definite proposition is made on the one side and accepted on the other, with an understanding that the agreement shall be expressed in a formal writing, ever be bound until that writing is signed? If they are at liberty to repudiate the proposition or acceptance, as the case may be, at any time before the paper is signed, and as the market may go up or down, then this case is well decided. But if, at the close of the correspondence, the plaintiffs became bound by their offer, and the defendant by its acceptance of that offer, whether the final writing was signed or not, as I think it was, under such circumstances as the record discloses, then the conclusion of the learned referee was erroneous. To allow either party to repudiate the obligations clearly expressed in the correspondence, unless the other will assent to material conditions, not before referred to, or to be implied from the transaction, would be introducing an element of confusion and uncertainty into the law of contract. If the parties did not become bound in this case, they cannot be bound in any case."

In the light of these authorities we think it plain that when Cotton & Company accepted the offer made to them by Rutger, Bleecker & Co. in the letter of August 29th, a binding contract was made.

It is always instructive to find out how the parties themselves look upon the effect of such a transaction as we are now considering. On or about the 25th of September, Mr. Cotton and his sales manager, Mr. Leon, met Mr. Salisbury of the Standard Oil Company in the lobby of the Hotel Astor in New York City. Mr. Cotton's testimony is, as follows (Transcript, page 27):

> "In the course of the conversation Mr. Salisbury asked me, us, what we were doing, what we had for sale, if we were doing any business. I replied to him that we had a substantial quantity of 105-8 melting point wax for sale, and asked if he was interested. His answer to that was an inquiry where this match wax was located. I told him in San Francisco. He said he might be interested in the purchasing of match wax in San Francisco and that if we would make him a price and let him have it firmly in hand for a few days, I think until the following Saturday, that he thought he would buy it."

Mr. Cotton evidently thought he had some kind of a hold on the wax. If he had only been negotiating for the purchase of wax, he probably would not have made Mr. Salisbury a firm offer.

On September 30, 1918, nearly two weeks before the formal contract was signed, Cotton & Company sent to the Ozmo Oil Refining Company a telegram (Transcript, page 49), in which they said, amongst other things:

> "Referring our contract wax is this material packed tight iron hooped oil barrels?"

When Mr. Cotton said "contract wax", he meant the wax that he had confirmed purchasing in his letter of August 31, 1918.

Mr. Leon, Mr. Cotton's sales manager, testified on cross-examination, as follows (Transcript, pages 60-61):

> "Q. Cotton & Company would not have resold the wax unless they had a contract which they considered binding, would they?
>
> A. They considered it binding. It happens every day and as the market was practically at the peak at that time, it looked like a mighty good sale.
>
> Q. So then it was not on the reliance of this contract?
>
> A. Yes, absolutely, it was on the reliance of this contract. The contract was not signed, but it was upon the assumption that the contract would be signed that the sales were made. I have no knowledge myself whether Osmo Oil Refining Co. paid a commission to Rutger, Bleecker & Co.
>
> Q. Is it the custom of the trade to consider that an accepted offer to sell binds the party making the offer? In other words, does it make a contract?
>
> A. Well that is a difficult question. It does not make a contract—no—but of course it is understood that provided the parties agree on the conditions of payment and no other modifications are brought up later which might necessitate a (49) change in any other way in the original acceptance, then a sale has been consummated.
>
> Q. Well, after, to adopt your phrase, a sale has been consummated, a seller according to the custom of the trade would not be in a position to repudiate it?

> A. Certainly, if the buyer made objections to certain clauses in the contract, and so could the buyer if the seller made objections as to certain clauses or demands. For instance, should Cotton have refused to offer a letter of credit as Ozmo demanded, Ozmo might at their option have considered the sale as not binding or have agreed to ship the goods on sight draft terms as originally offered. It is done every day, for after the parties modify the terms they have to agree as to such modifications."

This explanation is naive, to say the least. Mr. Leon considered the offer and acceptance of the wax binding for the purpose of a resale to the Standard Oil Company, but not binding if either party made any objections to certain clauses or demands! On page 64 of the Transcript, we find Mr. Leon testifying on re-direct examination, as follows:

> "That does not help me to refresh my memory as to how soon after the original offer and bid I notified Rutger, Bleecker & Co. that I had resold it, except that I know it was within a few days *after the contract was closed. By this I mean after the offer had been made and accepted by Rutger, Bleecker & Co., and we had made a counter-bid which they accepted*—but this was before any written contract was made."

Here Mr. Leon has plainly said that when the offer was made and accepted—that is to say, on August 31, 1918—the "contract was closed". It is perfectly evident that Cotton & Company's reliance on the signature of the formal contract is an afterthought.

On September 17, 1918, Cotton & Company wrote to Rutger, Bleecker & Co. (Transcript, page 69) in which they said: "We wish to point out that *our purchase* was for 700 tons." Yet they now contend that they had not *purchased* any wax but were merely *negotiating* to that end.

On October 8, 1918, Cotton & Company again wrote the Ozmo Oil Refining Company, saying:

> "We are enclosing herewith a letter covering 600 tons of wax purchased from you and which has been resold to the Standard Oil Company of New York. The 100 tons for shipment, 50 tons monthly November/December, 1918, has been resold to Messrs. Mitsui & Co., Ltd., of San Francisco."

Then follow instructions in regard to marking the Mitsui wax. They then say:

> "In accordance with your request, we have arranged with our bank to open a letter of credit in your favor covering the entire amount of this contract, which will be done as soon as your signed contract has been received by us."

This shows beyond any question the real purpose of the formal contract. Cotton & Company had to have some convenient evidence other than correspondence to take to the bank in order to make the necessary arrangements for financing the purchase of the wax.

The Ozmo Oil Company also indicated that it considered the contract closed, for on September 25, 1918, it wired Cotton & Company, as follows:

> "In reference to wax contract will you be kind enough to establish irrevocable credit in our favor with your bank in order that the sight drafts may be taken up when presented and due."

The offer of August 29th, and Cotton & Company's acceptance of August 31st was a complete and binding contract, and no further writing was necessary to bind the parties. They contemplated an "official contract" simply to have the evidence of their agreement in a convenient form for financing purposes. This is made plain by Mr. Cotton's letter of September 17th. (Transcript, page 69.)

The contract being actually made on August 31, 1918, it follows that the Ozmo Company was not responsible for the special damages suffered by Cotton & Company on account of their inability to fill the Standard Oil and Mitsui contracts. There is no evidence whatever that the Ozmo Company, on or prior to August 31, 1918, had any notice of resale. According to Mr. Cotton and Mr. Leon, no resale was talked of until they met Mr. Salisbury at the Astor Hotel on or about September 25th. The true measure of damages for the Ozmo's breach of the contract was the difference between the market price and the contract price. The contract price was 9¼c and the market price from November, 1918, to and including December, 1919, was never above 9c. (Transcript, page 113.)

For the foregoing reasons it is submitted that the judgment in this case is wrong and ought to be

reversed. There are two other points, however, to which we wish to call the Court's attention.

POINT II. ASSUMING THAT NO CONTRACT FOR THE SALE OF THE WAX WAS MADE UNTIL OCTOBER 14, 1918, THE NOTICE OF RESALE GIVEN BY THE COTTON COMPANY TO THE OZMO COMPANY WAS INSUFFICIENT TO BRING INTO PLAY THE RULE ALLOWING LOSS OF PROFITS AS DAMAGES.

Let us see just what the evidence of resale amounted to. Mr. Leon testified (Transcript, page 64) that he notified Messrs. Rutger, Bleecker & Co. that he had resold the wax "within a few days after the contract was closed". Continuing, he said:

> "By this, I mean after the offer had been made and accepted by Rutger, Bleecker & Co., and we had made a counter-bid which they accepted—but this was before any written contract was made."

On September 30th Cotton & Company wired the Ozmo Company, "This material sold responsible buyers". (Transcript, page 49.) On October 3, 1918, Cotton & Company wrote to the Ozmo Company, "The material has all been resold to responsible houses." (Transcript, pages 71, 72.) This letter was received by the Ozmo Company on October 14th, the date of the execution of the formal contract. (Transcript, page 110.)

On October 8, 1918, Cotton & Company wrote to the Ozmo Company stating that 600 tons of the wax had been resold to the Standard Oil Company and

100 tons to Mitsui & Co. (Transcript, page 73.) This letter was received by the Ozmo Company on October 14th, the date of the execution of the formal contract. (Transcript, page 110.)

It will be noted that prior to October 14th Cotton & Company had notified the Ozmo Company of one thing only—and that was that the material had been resold to responsible houses. No mention was made of the *market* in which the wax had been resold, nothing was said as to whether or not the resales had been made at a *profit.*

It is our contention that in order to charge a seller with loss of profits on resale he must know that the goods are either being purchased for resale in a particular market, or for the purpose of fulfilling a particular contract. This rule is set forth with great clearness in

2 *Mechem on Sales,* Sections 1761, 1762 and 1763.

It is as follows:

> "Sec. 1761. Loss of Profits on Resale Contracted For.—The case of the vendee who is seeking to recover damages for the loss of profits which he might have made upon a resale of the goods furnishes a typical instance of the application of the rule.
>
> If the purchaser intended to resell the goods in the market, but had not in fact contracted for their resale; or if he had contracted to resell them, but at the market price, then the usual rule of the difference between the contract and the market price furnishes an adequate remedy. But, supposing that the vendee bought the goods

for resale in a particular market, or had actually made a contract for their resale at more than the market price, and loses the benefit or profit he might so have made, how then are his damages to be estimated?

Sec. 1762. Resale Not Contemplated.—Applying here the rules above laid down, the result will be that if the seller had, at the time he made the contract to sell, no knowledge or notice that the goods were being purchased for resale in a particular market or to be supplied under an existing contract for their resale at a particular price, no damages based upon the loss of that particular market or of the profit under that particular contract can be recovered. The buyer must here content himself with the damages which may be estimated upon the basis of the general market or the actual value. A resale at a particular profit is not so far the usual and the natural result, even when goods are known to be purchased for resale, as to bring it within the first branch of the rule of Hadley v. Baxendale.

Sec. 1763. Resale Known to Vendor.—If, however, at the time the contract is made, the seller has such notice or knowledge that the goods are being purchased for resale in a particular market, or to be supplied in pursuance of a particular contract, that he may fairly and reasonably be deemed to have made his contract in contemplation of that purpose, and to have assumed the risks thereby entailed, then, if he breaks his contract, damages for losses caused thereby, if not uncertain or remote, may be recovered."

The evidence in this case certainly does not show that Messrs. Cotton & Company bought the wax for resale in a particular market. Prior to October 14th, the date of the execution of the "formal con-

tract", they had said only one thing to the Ozmo Company and that was that the material had been resold to responsible houses. As a matter of fact, one of these houses bought the goods for the Japanese market, but this was unknown to the Ozmo Company. In the nature of things, they could not know in which market Messrs. Cotton & Company intended to dispose of the wax. No mention was made of the price at which Cotton & Company had resold. They might have resold the wax at the same price, either for the purpose of accommodating a customer or to carry out some previous arrangement. At any rate, the Ozmo Company was not notified in any way that Cotton & Company had resold at any particular price. It has been held time and again that mere knowledge that goods are bought for resale will not render expected profits on resale an element of damages.

Globe Refining Co. v. Landa Cotton Oil Co.,
190 U. S., 540, 47 Lawyers' Edition, 1171.

In

Setton v. Eberle-Albrecht Flour Company, 258
Federal,

the Court said, at page 907:

> "(2) To the general rule there is an exception, which is accurately expressed in Sutherland on Damages, section 662, page 2343, as follows:
>
> > 'If the buyer has, in advance, made a contract for resale, and discloses that fact to his vendor, who undertakes to furnish the commodity and deliver it at a specified time and place, arranged with reference to enabling

the buyer to fulfill his contract for resale, and the vendor fails to deliver the property, he will be liable for damages on the basis of the profits the vendee would realize upon his contract for such resale.'

This exception is well illustrated and explained in Rahm v. Deig, 121 Ind. 283, 23 N. E. 141; Howard Supply Co. v. Wells, 176 Fed. 512, 100 C. C. A. 70; West Drug Co. v. Byrd, 92 Fed. 290, 293, 34 C. C. A. 351; Southern Flour & Grain Co. v. McGeehan, 144 Wis. 130, 128 N. W. 879.

Mere knowledge that goods are purchased for resale in the ordinary course of business will not take the transaction out of the general rule and place it under the exception. If that were not so, the exception would swallow up the general rule completely, for it is always known that, when goods are bought from a manufacturer by a broker or wholesaler, or by a retailer from a jobber, the buyer purchases for resale. To bring a case within the exception, the buyer must have an existing contract for resale at the time of the purchase, and must buy for the purpose of enabling himself to perform his obligations on the resale, and these features must be clearly explained to the seller, and he must enter into his contract for the purpose of enabling the buyer to perform his obligations under the contract of resale. The same result will follow if the buyer is acting as the agent of the seller, as in Cook Mfg. Co. v. Randall, 62 Iowa, 244, 17 N. W. 510, and McCormick Harvesting Co. v. Jensen, 29 Neb. 102, 45 N. W. 160.

It will be found, upon a careful examination of authorities entitled to be considered, that in order to take a case out of the general rule there must be present some special feature, such as those to which we have adverted. Such special features must be sufficient to take the case out of the special title of Sales and place it under

the general law of Contracts. Then the rule of Hadley v. Baxendale, 9 Exch. 341, as qualified by later decisions, may control. Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 540, 23 Sup. Ct. 754, 47 L. Ed. 1171. Mere knowledge that goods are purchased for resale is not sufficient to produce that result. One reason for this is that the market price at the place where the goods are to be resold carries the transaction one stage nearer the ultimate consumer than the original sale, and always shows a higher market value than that which controlled between the original buyer and seller. It would be manifestly unjust to measure the damages by a market value thus enhanced. This feature is well explained by Judge Adams, speaking for this court, in Salmon v. Helena Box Co., 147 Fed. 408, 412, 413, 77 C. C. A. 586."

To the same effect

Rahm v. Deig, 23 Northwestern, 141 (Indiana);

Wappoo Mills v. Commercial Guano Company, 18 Southeastern, 308;

Huggins v. Southeastern Lime & Cement Company, 48 Southeastern, 933;

Alabama Chemical Company v. Geiss, 39 Southern, 255;

Righter v. Clark, 60 Atlantic, 741.

As Judge Amidon said in the Setton case,

"To bring a case within the exception, the buyer must have an existing contract of resale at the time of the purchase, and must buy for the purpose of enabling himself to perform his obligations on the resale, and these features must be clearly explained to the seller, and he must enter into his contract for the

purpose of enabling the buyer to perform his obligations under the contract of resale."

We do not think that Messrs. Cotton & Company succeeded in bringing themselves within this rule by merely notifying the Ozmo Company that the wax had been resold to "responsible houses". To be entitled to the special damages claimed, they ought to have notified the Ozmo Company that they had contracts for resale in a particular market and at a profit. They did neither, and they should have been limited in this case to the recovery of the difference between the contract price and the market price at the time and place of delivery. As there was no margin in their favor, judgment should have been for the Ozmo Company.

POINT III. UPON THE FAILURE OF THE OZMO COMPANY TO DELIVER THE WAX, IT WAS THE DUTY OF MESSRS. COTTON & COMPANY TO MINIMIZE THEIR DAMAGES BY PURCHASE IN THE OPEN MARKET.

This they did not do. (Transcript, page 40.)

The rule seems to be that where a seller of a merchantable commodity fails to furnish the goods according to promise, it is incumbent on the buyer to provide himself as cheaply as he conveniently can, from the most accessible sources, and thus lighten the loss, and his recovery will be curtailed by the sum which thus might have been saved.

Creve Coeur Lake Ice Co. v. Tamm, 90 Mo. Appeals, 189;

Armeny v. Madson & Buck Co., 111 Ill. Appeals, 621;

Bannon v. St. Bernard Coal Co., 39 Southwestern, 252;

Consolidated Coal Company v. Mexico Fire Brick Co., 66 Missouri Appeals, 296;

Kinports v. Breon, 44 Atlantic, 436;

Edgeworth v. Talerico, 95 Southwestern, 677.

In

Benjamin on Sales, 7th Edition, at page 934, we find this language:

> "In every case the buyer, to entitle him to recover the full amount of damages, must have acted throughout as a reasonable man of business, and done all in his power to mitigate the loss."

It is admitted that the market price of the wax, f.o.b. San Francisco, from November, 1918, to and including December, 1919, was never over 9c per pound, and that for two months during that period it was as low as 4½c per pound. Cotton & Company could have gone into the market and purchased wax against their Standard Oil and Mitsui contracts, but there is no evidence of any attempt to do so. Mr. Cotton explained (Transcript, page 40) that he did not dare to make purchases "in view of the fact that they insisted they were going to compel us to take delivery of this wax, which they claimed all the time they could furnish". It is hard to understand how the Ozmo Company could have compelled Mr. Cotton to take delivery of the wax, as they had failed to deliver any wax in November,

1918, the time provided for the first delivery of fifty tons.

SUMMARY.

It clearly appears from the evidence that the contract to purchase the wax was made on August 31, 1918, before any notice whatever of resale or intent to resell was given by the buyer. This in itself demonstrates the trial court's error in applying the rule of special damages.

If we admit for the sake of argument that no contract was made until October 14, 1918, then the notice given by the buyer was insufficient because it did not advise the seller that the goods were bought for resale in a particular market or at a profit.

The failure of the buyer to go into the open market and buy wax against the Standard Oil and Mitsui contracts was a breach of its duty to lighten its loss.

It is respectfully submitted that the judgment ought to be reversed and that the plaintiffs in error should have judgment against the defendant in error for their costs.

Dated, San Francisco,
October 10, 1921.

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